Legislative Snapshot:
Number 3

Malpractice

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A "SNAPSHOT" OF STATE LEGISLATIVE ENACTMENTS IN THE 1979 SESSIONS RELATING TO MALPRACTICE

by Peter E. Carlin

In the mid-1970s, a number of states were confronted with a "medical malpractice crisis." As premiums for malpractice liability coverage skyrocketed, with a corresponding increase in health care costs, insurance companies, consumer groups, hospitals, and physicians all placed intense pressure on state officials to deal with the"crisis." During 1975, state legislatures responded by enacting a host of new laws designed to stabilize insurance markets and introduce new procedures for medical malpractice actions. In brief, these laws established study commissions, created Joint Underwriting Associations, and revised civil practice laws as they related to medical malpractice.

The burst of legislative activity that characterized the 1975 response has abated somewhat, although states continue to enact a variety of new laws. The past few years have witnessed the passage of several new statutes in an effort to iron out any existing problems. This limited but highly significant activity is reflected in the medical malpractice legislation of 1979. During this year, twenty states enacted a total of forty-four new laws relating to different areas of malpractice. The bulk of these statutes was primarily concerned with expanding or amending legal procedures intrinsic to any malpractice action. Other legislative efforts included the extension of Joint Underwriting Associations and the introduction of more precise guidelines with respect to awarding damages.

One of the most interesting and prominent developments that emerged out of the legislative flurry of 1975 was the creation of arbitration and medical screening panels as alternatives to litigation. The rationale underlying the creation of these two mechanisms is that they serve to reduce an excessive burden of litigation on the court system; that they reduce nonmeritorous claims; and that they hopefully encourage pretrial settlements. An example of this type of legislation was enacted in KANSAS in 1979. According to this new law, KANSAS now allows either party involved in a malpractice action, or the presiding District Court Judge, the right to convene a screening panel. The panel consists of an attorney, acting as chairperson, and three health care providers.

As the result of a 1979 amendment, MARYLAND now provides explicit procedures to be followed in the event one of the parties objects to the inclusion of an arbitrater on its arbitration panel. In addition, this statute stipulates that in any malpractice action involving more than one health care provider, all must be treated as a single party. The intent of one of VIRGINIA'S 1979 malpractice laws is to grant the chairperson of its review panel several new responsibilities. The chairperson is now authorized to rule on any question surrounding the admissibility of evidence; to resolve any disputes that arise between the concerned parties; to determine any legal question involved in the proceedings; and to write the panel's final decision.

In 1979, a number of states actively sought to more precisely define the legal terms involved in medical malpractice actions. ARKANSAS'S new statute, for example, clearly defines a medical injury as well as a medical care provider. LOUISIANA and VIRGINIA incorporated the prevailing definitions relating to standard of care and expert testimony, while NEW YORK expanded its definition of hospital to include both home care service agencies and ambulance services.

Another major issue pertaining to medical malpractice is the awarding of damages in malpractice actions. A comprehensive statute passed in ARKANSAS in 1979 interprets damages as compensation for both economic and noneconomic losses and further states what elements are included in each type of loss. Another provision of ARKANSAS'S new law follows the precedent established by other state laws by incorporating periodic payments into its award procedures. The amount of damages must exceed $100,000 before periodic payments can be authorized.

One of MARYLAND'S three malpractice laws enacted in 1979 provides the procedures to be followed for any individual who rejects an arbitration award. In any such instance, the party must file a written notice of rejection with the Director of the Health Claims Arbitration Office. Moreover, the party rejecting the award must file an action in the appropriate court nullifying such award.

One of the central features of past malpractice legislation was the exemption from civil damages of any health care providers who reported cases of misconduct or gross malpractice to medical review boards. During 1979, state legislatures enacted several statutes in this regard. WASHINGTON now grants immunity to any health care provider who files charges or presents evidence, before a professional review committee or hospital board, against another member of his/her profession that is based upon misconduct or incompetence of such person. In addition, this law prohibits any written reports of such committees or boards from being subjected to subpoenas or discovery proceedings in any civil action. The exception is when such an action arises out of the recommendations of these committees or boards.

Similarly, KANSAS now exempts from a civil action for damages any person who reports to their state board of healing arts any information relating to an alleged incidence of malpractice, or the qualifications or character of a licensed health care practitioner. Parallel legislation also was enacted in DELAWARE and VIRGINIA in 1979. DELAWARE exempts from liability any person who files a complaint or provides information to the medical board concerning the unauthorized practice of medicine. VIRGINIA'S new statute exempts from civil liability any person who reports a health care provider's unethical or fraudulent conduct.

Closely related in subject matter to these laws were a series of acts passed in several other states in 1979. One of ARKANSAS'S new malpractice statutes exempts physicians and surgeons from civil damages as a result of any acts or omissions in rendering emergency medical care to a participant in a school athletic event, or during transportation to a health care facility for an injury suffered in the course of an athletic contest. Another statute enacted in VIRGINIA exempts any physician from liability for civil damages if he/she renders medical service voluntarily and without compensation at any free clinic. As the result of 1979 legislation, ILLINOIS hoped to encourage its citizens to participate in CPR programs by exempting them from malpractice liability when rendering CPR services in emergency situations.

Health care providers who are under contract to the state was the subject of a 1979 law in LOUISIANA. The Attorney-General of LOUISIANA is required to designate an experienced malpractice attorney to act as legal counsel in the defense of claims filed against any providers working for the state. Any settlement agreed to by the state and the claimant is binding upon both parties.

There were several other miscellaneous changes in state malpractice law during 1979. IDAHO'S new statute clearly stipulates the sundry medical acts that are subjected to discipline by the state's medical board. In NORTH CAROLINA, a new statute prohibits the state from placing a lien against a judgment or settlement of a claim for damages arising out of a negligent injury suffered at a state institution. Another 1979 VIRGINIA malpractice statute mandates guidelines to be followed for reinstatement of suspended licenses or certificates.

A number of states enacted legislation with respect to regulating insurance company practices. TENNESSEE now requires insurance companies to report any settlement or judgment that exceeds $5,000 to the State Board of Medical Examiners within thirty days. ARIZONA, SOUTH CAROLINA, TENNESSEE, MICHIGAN and MAINE passed laws extending the termination date of their Joint Underwriting Associations, while IDAHO created a temporary JUA that requires every insurer in the state to be a member.

The Intergovernmental Health Policy Project has full text copies of each of the enacted state laws relating to malpractice. They are available upon request. (Please enclose a self-addressed label -- it is extremely helpful to our staff.)

Note: Every attempt was made to be as comprehensive as possible in listing current state laws relating to malpractice. Omissions may occur, however. The Intergovernmental Health Policy Project would appreciate receiving information about further developments.

STATE-BY-STATE SUMMARY

OF

1979 LEGISLATION

RELATED TO

MALPRACTICE

ARIZONA - House Bill 2124

This act extends the life of Arizona's Joint Underwriting Plan and further places the plan under the jurisdiction of the Department of Insurance. The JUA is authorized to provide professional liability insurance, including excess coverage, to any health care providers and hospitals licensed by the state. Under this law, any professional liability insurance policy can be written only for one year.

Another element of this statute establishes a Board of Directors to regulate the operations of the plan. The Board consists of a director, the attorney-general, and various other state officials. To implement the plan, the Board is required to issue any necessary rules and regulations. Furthermore, the Board is authorized to collect any information on professional liability judgments and issue a report by October 1980.

Finally, the law creates a study committee to review and evaluate the progress of the JUA.

ARKANSAS - House Bill 1055

This comprehensive statute precisely defines such terms as medical injury and medical care providers.

It mandates that the statute of limitations pertaining to medical malpractice actions is two years. Furthermore, it eliminates the Ad Damnum clause formerly required in malpractice actions.

In regard to damages, this law explicitly provides compensation for economic losses as well as for medical or rehabilitative costs, and for any noneconomic losses that may include both pain and suffering. The court is required to state separately its award for both past and future economic and noneconomic losses. Moreover, in cases where the award exceeds $100,000, the court now possesses the option of awarding those damages in one lump sum or by periodic payments.

Finally, in any action for medical injury, no witness is permitted to give "expert testimony" if his/her comensation depends upon the outcome of the case. In addition, no health care provider is required to give "expert testimony" against himself/herself.

ARKANSAS - House Bill 13

This law exempts physicians or surgeons from civil damages as the result of any acts or omissions in rendering emergency medical care to a participant in a school athletic event. It also covers medical care rendered while transporting a participant in such a contest to a health care facility. However, the immunity granted by this section does not apply in the event of an act or omission constituting gross negligence.

ARKANSAS - House Bill 732

Any physician or surgeon who renders emergency care or assistance without compensation at the place of an emergency or accident is exempted from liability for any civil damages. Any actions, however, must be performed in good faith and by reasonable and prudent persons.

Furthermore, this act states that any person who is not a physician, nurse, or other skilled medical care provider, and who is present at the scene of an emergency or accident can lend emergency assistance if he/she believes that the life, health, or safety of an individual is threatened. An individual who renders care under these circumstances cannot be held liable for civil damages so long as the person acted in good faith and in a reasonably prudent manner.

CALIFORNIA - Assembly Bill 411

This amendment revises an existing law that required an attorney to submit a certificate in any negligence action stating that he had consulted a specialist and believed that the claim had merit. This statute now requires an attorney to file such a certificate on or before the date the complaint is served on the defendant. If the attorney fails to file such a certificate, grounds exist for a demurrer.

Another provision of this law prohibits any insurance company from increasing the premium of a health care provider's professional liability insurance if he has been given prior notice of the legal basis for the claim and the type of loss. The exception is if a complaint is served on the health care provider.

DELAWARE - House Bill 345

This law exempts from civil liability any person who files a complaint or provides information to the medical board concerning the unauthorized practice of medicine.

HAWAII - House Bill 160

In regard to malpractice insurance, this law reduces the required initial trust corpus minimum reserve of the physicians and surgeon's cooperative indemnity from $5,000,000 to $3,000,000.

HAWAII - House Bill 604

The purpose of this statute is to conform the language used in Hawaii's medical malpractice legislation. Under this law, premiums that are reported under medical malpractice, or other types of liability insurance, must be included under the new definition.

IDAHO- House Bill 23

This statute creates a temporary Joint Underwriting Association for two years. Every insurer in the state is required to be a member.

IDAHO - House Bill 17

The concern of this law is to provide precise guidelines for disciplining a medical care provider. The grounds for discipline range from a failure to meet generally recongnized standards of care to perfroming illegal abortions. Every individual licensed to practice medicine, or registered as an intern, resident, or physician's assistant, is subject to this act's provisions.

ILLINOIS - Senate Bill 94

The intent of this law is to encourage persons to participate in basic cardiopulmonary resuscitation courses. Any individual who renders CPR in an emergency situation is exempt from civil liability.

ILLINOIS - Senate Bill 892

This act is concerned with nonprofit health care service plans. Under this law, so such corporation may be liable for injuries resulting from negligence, malfeasance, or malpractice on the part of an employee or officer of the corporation. In addition, no hospital, physician, or other health care provider who renders health care service to its providers may be liable.

KANSAS - Senate Bill 58

This law provides for the convening of a screening panel if requested by a judge or by either party involved in a malpractice action. The panel consists of a health care provider selected by each party, a health care provider chosen by both parties, and an attorney selected by the court to act as chairperson.

KANSAS - House Bill 2008

This act is concerned with providing immunity to any person who reports to the state board of healing arts any information relating to an alleged incidence of malpractice, or to the qualifications or character of a licensed physician. The individual reporting such information cannot be subjected to civil action for damages.

Furthermore, this law grants immunity from liability to any state, regional, or local association composed of persons licensed to practice a branch of medicine which investigates the qualifications, fitness, or character of any licensee or registrant to the state board of healing arts.

LOUISIANA - House Bill 449

This amendment defines both "tort" and "standard of care." "Tort" is defined as any negligent act, breach of duty, or omission that results in injury or damage to another.

"Standard of care" refers to the degree of skill or specialty employed by other licensed health care providers in any community within Louisiana.

LOUISIANA - House Bill 450

This law states that in any malpractice claim, the plaintiff has the burden of proving that a licensed physician failed to observe the generally recognized degree of care ordinarily practiced by physicians and dentists within that community, specialty, or in the state.

LOUISIANA - House Bill 658

This amendment revises state's patient compensation fund with respect to surcharges and premiums for malpractice liability insurance.

LOUISIANA - House Bill 828

This act concerns health care providers who are under contract to provide services for the state.

It requires the attorney-general to designate an experienced medical malpractice attorney to act as legal counsel for the Division of Administration in the defense of claims filed against any providers working for the state. The attorney-general must also establish a fee schedule that provides for payment for such employees.

Any settlement effected between the state and the claimant is binding upon both parties, and subject to the approval of the district court of the locality where the claimant lives or the state capitol.

Any petition seeking court approval must include the basic facts alleged to constitute malpractice, the damages sustained, and the amount to be paid to the claimant.

MAINE - Legislative Document 319

This statute extends the termination date of this state's Medical and Hospital Malpractice Joint Underwriting Association until July 1, 1980. Its purpose is to provide a market for medical malpractice insurance on a self-supporting basis.

MARYLAND - House Bill 384

The purpose of this law is to stipulate the procedures to be followed in the event that one party involved in a malpractice action objects to the inclusion of an arbiter on this state's arbitration panel. The party who objects must file a written notice with the Director stating his or her objection. If the Director agrees with the objection, he must replace the name of that arbitrator with another.

Furthermore, this law states that in any action against more than one defendant health care provider, they all must be treated as a single party. The same is true in the case of more than one claimant.

MARYLAND - Senate Bill 782

This act provides certain guidelines for disclosing medical information. Such guidelines do not apply to any medical care provider who gives information to a defendant or defendant's counsel in connection with a malpractice claim.

MARYLAND - House Bill 386

Any party who rejects an arbitration award is required to file notice of such rejection with the Director of the Health Claims Arbitration Office within ninety days. The party who rejects the award must file an action in court to nullify the award.

MICHIGAN - House Bill 4586

Essentially, this law establishes a nonprofit malpractice insurance fund that provides malpractice insurance to health providers.

Furthermore, it clarifies the status, rights, powers, and duties of the insurance fund.

MISSOURI - House Bill 445

This act is concerned with exempting from civil liability any person licensed to practice medicine in Missouri who renders emergency care without compensation. However, that individual may be liable for damages caused by gross negligence or omissions in rendering such emergency care.

NEW YORK - Assembly Bill 729

This act expands the definition of the term hospital, as used in provisions relating to medical malpractice, to include ambulance services that provide definitive acute medical care.

NEW YORK - Senate Bill 5552

This law expands the definition of the term hospital to include any certified public or voluntary nonprofit home care service agency that possesses a valid certificate of approval.

NORTH CAROLINA - House Bill 1252

Prohibits the state from placing a lien against a judgment or settlement of a claim for damages arising out of a negligent injury suffered at a state institution. However, it does allow the state to place a lien on that individual estate once that patient had died.

SOUTH CAROLINA - House Bill 2525

Extends the expiration date of this state's Joint Underwriting Association until December 31, 1981.

SOUTH CAROLINA - House Bill 2178

This amendment expands the definition of health care providers to include directors, officers and trustees of hospitals.

SOUTH CAROLINA - Senate Bill 327

The purpose of this amendment is to require all information and proceedings of medical society and review committees to be kept confidential, unless a respondent in such proceedings requests that they be made public. These proceedings are not subject to discovery or subpoena,nor can they be introduced into evidence except upon appeal from the committee's action.

SOUTH CAROLINA - House Bill 2697

Mandates that membership fees in the Joint Underwriting Association for the first year cannot be more than the basic professional liability insurance premium. It further stipulates the fee structure for any years following the first.

TENNESSEE - House Bill 139

This law extends for two more years Tennessee's Medical Malpractice Review Board.

TENNESSEE - Senate Bill 833

This law requires insurance companies, who provide coverage against civil liability as a result of negligence or malpractice, to report any settlement or judgment exceeding $5,000 to the State Board of Medical Examiners within thirty days.

The confidential report that is submitted must include the names and addresses of the licensed physician, the plaintiff, and the court in which the claim was filed. The amount of the judgment and the identity of the insurance company and its representative who filed the report must also be included.

TENNESSEE - Senate Bill 1232

This amendment authorizes the clerk of any court that has convicted a licensed physician to submit a record of that case within thirty days to the Medical Board. The Board then must issue a report within sixty days describing the type of action it intends to take against the convicted physician. Such action may involve revoking, suspending, or a variety of other disciplinary measures.

TENNESSEE - House Bill 137

This statute states that June 30, 1986 is the termination date for Tennessee's Joint Underwriting Association. After this date, the Commissioner is authorized to refuse any further claims on policies issued by the JUA.

TENNESSEE - House Bill 136

This law terminates Tennessee's JUA Stabilization Reserve as of June 30, 1986.

TENNESSEE - Senate Bill 298

This act states that any agreements made by a university operating an accredited medical school, clinic or hospital, that binds the university to indemnify its professional health care employees for damages or claims arising from an act of negligence or malpractice, is not considered a contract of insurance.

TENNESSEE - Senate Bill 347

This act requires all insurance companies that issue malpractice insurance to licensed physicians to issue policies covering physicians of all classifications of practice. Insurance companies are not prevented from limiting the amount of coverage, however, or from making premium surcharges for the insurance.

UTAH - House Bill 164

This amendment stipulates the statute of limitations in any malpractice act as two years. In addition, under this law, no patient may initiate a malpractice action unless he/she gives the health care provider at least ninety days notice prior to commencing such an action.

VIRGINIA - House Bill 1985

This act defines "standard of care" as that degree of skill ordinarily employed by licensed health care practitioners within localities or within the state.

VIRGINIA - House Bill 1793

This statute is concerned with clarifying what constitutes evidence that is submitted to the medical review panel. Under this law, evidence can consist of x-rays, medical charts, laboratory tests, depositions, excerpts of treatises, or oral testimony.

In regard to the review panel itself, the chairperson is provided with certain powers. He is empowered to rule on the admissibility of any deposition offered as evidence, to resolve any disputes that might arise if one party objects to any part of the discovery proceedings, to determine any legal question involved in the review process, and to write the panel's final opinion.

Any deposition employed in the discovery proceedings can be utilized in any subsequent civil proceeding based upon the same claim.

Other procedures stipulated in this law are: either the claimant or the health care provider may request the

medical review panel to hold a hearing on any claim; in regard to testimony, that members of the panel may administer oaths; and in the event of a hearing, that both parties are entitled to be heard, to present evidence, and to cross-examine witnesses. The rules of evidence, however, do not have to be observed. The panel may issue subpoenas for any witnesses, documents, or other evidence.

All members of the panel are required to be present at a hearing, but only a majority is needed to render an opinion. Finally, the panel may issue an opinion even though one party refused or failed to appear.

VIRGINIA - House Bill 1482

This act requires hospitals or other health care institutions to report any disciplinary actions against a health provider. Furthermore, it requires these institutions to report any health care provider who is undergoing treatment for drug abuse or for psychiatric illness, or any professional who may be guilty of unethical or fraudulent conduct. Any person preparing or submitting such a report is immune from civil liability.

This law further provides for compensation for members of the panel and its secretary.

Finally, the statute includes the procedures to be followed for suspending and later reinstating a health care provider's license or certificate.

VIRGINIA - Senate Bill 833

This law exempts any physician who renders medical service, voluntarily and without compensation at any free clinic, from civil liability. The exception is that act or omission caused by gross negligence or willful misconduct.

WASHINGTON - Senate Bill 2221

This statute grants immunity from civil damages to any health care provider who files charges or presents evidence before a review committee or board of a professional society or hospital, against another member of his or her profession based upon gross misconduct or claimed incompetence of such person.

The written reports of such boards or committees are not suject to subpoenas or discovery proceedings in any civil action, except actions arising out of recommendations of such committees or boards.

Intergovernmental Health Policy Project

The Intergovernmental Health Policy Project serves a unique function in the development of the nation's health policy. It is the only university-based program in the country concentrating its research efforts exclusively on the health laws and programs of the 50 state governments. The Project provides assistance to state executive officials, legislators, legislative staff and others who need to know about important developments in other states. At the same time, the IHPP helps federal officials identify innovative state health programs and specific state problems.

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